IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

CRL.A.No. 456 of 2003()

SC.127/2000 of ADDL.SESSIONS COURT (ADHOC) I, KASARAGOD

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APPELLANT: ACCUSED

A.SANDESH KUMAR, S/O.B.M.UMESH,
AGED 23, HOSANGADI MANJESHWAR.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT/STATE

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1. STATION HOUSE OFFICER, MANJESHWAR
POLICE STATION.

2. STATE OF KERALA, REP; BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED-R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P. NO.2671 OF 2003 IN CRL. APPEAL NO. 456 OF 2003.

DISMISSED

26.10.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 456 OF 2003

Dated this the 26th day of October, 2007

JUDGMENT

The appellant - accused in S.C. No.127 of 2000 on the file of the Additional Sessions Court (Ad hoc) I, Kasaragod challenges the judgment of the trial court by which he was found guilty under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 22.6.1999 at 8.25 p.m., the accused and another person were found transporting 576 bottles each containing 180 ml. of A.J. Fenny, an Indian made foreign liquor in an autorickshaw bearing Registration No. KL - 14B/669 through the national highway without any licence or permit. Charge was framed against the appellant alone as the other accused absconded and his case has been split up. To prove the case against the appellant - accused, the prosecution examined PWs.1 to 3 and produced Exts.P1 to P7 as well as MO.1 series. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. The accused denied the prosecution charge and stated that the case was foisted

against him by the police. Relying on the evidence adduced by the prosecution, the trial court found the appellant - accused guilty under Section 55(a) read with Section 55(1) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions in challenging the judgment of the trial court: (i) the trial court was not justified in believing the evidence of PWs.1 and 3 to find that the appellant - accused was driving the autorickshaw in which 12 cases containing 48 bottles of Indian made foreign liquor were being transported as there was no evidence to show that the appellant was the driver of the said autorickshaw which belonged to PW.2, (ii) even accepting the evidence of the prosecution witnesses, the finding of the trial court that the appellant committed offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act is not legally tenable as there is no evidence to show that possession of the contraband articles was in

connection with export, import, transport or transit and (iii) in the light of the evidence adduced by the prosecution, the appellant can be punished only under Section 63 of the Abkari Act as per the judgment of this Court reported in **Sabu v. State of Kerala, 2007(4) K.L.T. 169**. In the light of the above contentions, this Court should consider whether the judgment of the trial court is justifiable or not.

5. The prosecution case as revealed from the evidence of PWs.1 to 3, though PW.2 turned hostile to the prosecution, was that while PW.3 , the then Sub Inspector of Police, Manjeshwar Police Station, who detected the offence, and PW.1, the Head Constable were checking the vehicles on the national highway, they saw the appellant and another accused transporting 576 bottles each containing 180 ml. of Indian made foreign liquor intended for sale only in the State of Karnataka, without any licence or permit for possession and transportation of the same. The evidence of PWs.1 and 3 would further show that on seeing them the appellant and the other person ran away from the place of occurrence and that the appellant was arrested subsequently on the basis of the information collected during investigation. The evidence of PWs.1 and 3 is supported by the evidence of PW.2, the owner of the autorickshaw in which the contraband articles were transported. Though this witness was declared hostile, he

had admitted in chief examination as well as in cross-examination that the autorickshaw bearing Registration No.KL 14B/669 belonged to him and that the appellant was the driver of the said autorickshaw. Though PW.2 stated that he could not remember whether the appellant - accused was driving the autorickshaw during the relevant time, that by itself is not a reason to disbelieve this witness. Hence, the contention of the learned counsel appearing for the appellant that there was no evidence either to show that the appellant was the driver of the autorickshaw or that he was driving the autorickshaw during the relevant time is not sustainable. Since it was admitted by PW.2 that he was the owner of the autorickshaw and that the appellant was the driver of the said autorickshaw, it was for the appellant to prove that the autorickshaw was not in his possession during the relevant time and that he was not driving the vehicle. When the appellant - accused was questioned under Section 313 Cr.P.C., he had stated that the autorickshaw was stolen and that a complaint was filed regarding the theft. But there is no evidence to show that any complaint had been filed in this regard. There was no attempt on the part of the appellant or PW.2 to summon any records from the police station with regard to the complaint. This creates some doubt in the case set up by the appellant. In the above circumstances, the trial court rightly accepted the evidence of PWs.1 and 3 to find that the appellant was driving the

autorickshaw during the relevant time. Further, the trial court also accepted Ext.P2 seizure mahazar and Ext.P4 scene mahazar which would show the seizure of the contraband articles, collection of samples for chemical analysis and production of the contraband articles before the court in time. No question was put either to PW.1 or PW.3 regarding production of the contraband articles before the court. PW.3 had stated that the material objects were in his custody till those items were produced before the court. The records now produced before this Court would show that the contraband articles and the samples were produced before the court on the very next day of the incident. Ext.P6 is the chemical analysis report which showed that the samples analysed were A.J. Fenny, an Indian made foreign liquor and that the samples contained 32.11 and 32.32 percent ethyl alcohol by volume. In the above circumstances, this Court is of the view that the prosecution succeeded in proving that the appellant - accused was found transporting and in possession of 576 bottles of Indian made foreign liquor.

6. The next question to be considered is whether the finding entered by the trial court that the appellant committed offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act is justifiable or not. As per the principles laid down by this Court in the decisions

reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan v. State of Kerala, 2006(1) K.L.T. S.N. 52 Case No.72**, to attract an offence under Section 55(a) of the Abkari Act, the prosecution must allege and prove that possession of such contraband articles was in connection with export, import, transport or transit. In this context, the evidence of PWs.1 and 3 would show that while they were checking the vehicles in the national highway, they saw the appellant and another person transporting Indian made foreign liquor in an autorickshaw. It is seen that except for the labels in the bottles, there is no other evidence to show that the contraband articles were being imported from outside the State. The evidence of PW3 also would show that the Karnataka Sales Tax Check Post was 200 feet away from the place of incident which means that the contraband articles could not have been imported. If so, the finding of the trial court that the appellant committed offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act is not legally tenable. Accordingly the said finding and the conviction and sentence ordered against the appellant under Section 55(a) of the Abkari Act is set aside.

7. Having accepted the evidence of PWs.1 and 3, the next question to be considered is what would be the offence for which the appellant can

be punished. The prosecution case being that the appellant was found transporting Indian made foreign liquor, the appellant has violated the provisions of the Foreign Liquor Rules. Rule 1A of the Foreign Liquor Rules defines foreign liquor as follows:

> "`Foreign Liquor' in these Rules means and includes all wines, spirits, beer, cider, fenny and other fermented liquors and plain rectified spirit including absolute alcohol intended to be used for the manufacture of liquors meant for human consumption into the State by sea or land or air, whether manufactured in India or outside."

Rules 9,11 and 11A of the Foreign Liquor Rules restricts possession and transportation of such Indian made foreign liquor. In the light of the above provisions of law, it can be safely concluded that the offence committed by the appellant is punishable under Section 63 of the Abkari Act for violation of the rules made under the provisions of the Abkari Act. The judgment of this Court reported in **Sabu v. State of Kerala, 2007(4) K.L.T. 169**, supports this view.

8. Another point to be considered is regarding the sentence awarded by the trial court. The trial court on finding that the appellant committed offence punishable under Section 55(a) read with Section 55(1) of the

Abkari Act sentenced the appellant to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. As per Section 63 of the Abkari Act, the maximum punishment that can be awarded for violation of the rules is a fine of Rs.5000/- or imprisonment for a term which may extend to two years or both. At this juncture, learned counsel appearing for the appellant submits that at the time of commission of the offence, the appellant was only 20 years of age. Considering the fact that the incident happened in the year 1999 and that the prosecution had not proved that the contraband articles were transported or possessed for the purpose of sale, this Court is inclined to take a lenient view with regard to the sentence. Accordingly, the appellant is sentenced to pay a fine of 5000/- and in default of payment of fine, to undergo simple imprisonment for a period of six months.

With the above alteration in the conviction and sentence, the Crl. Appeal is dismissed. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.456/2003

JUDGMENT

26th OCTOBER, 2007